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**IN THE
COURT OF APPEALS OF INDIANA**

| | | |
|-----------------------|---|-----------------------|
| RALPH MITCHELL, |) | |
| |) | |
| Appellant-Respondent, |) | |
| |) | |
| vs. |) | No. 64A03-0612-CV-573 |
| |) | |
| LISA DAWN MITCHELL, |) | |
| |) | |
| Appellee-Petitioner. |) | |

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable David L. Chidester, Temporary Judge
Cause No. 64D01-0402-DR-1436¹

September 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

¹ Appellant's brief also lists cause number 64D01-0402-PO-1466, in which appellee sought a protective order. Neither party appeals any order in that cause.

Case Summary

Ralph Mitchell (“Husband”) appeals the denial of his motion to correct error following the dissolution of his marriage to Lisa Dawn Mitchell (“Wife”). We affirm in part, reverse in part, and remand.

Issues

Husband raises three issues, which we restate as follows:

- I. Whether the trial court erred in failing to include certain assets in the marital estate;
- II. Whether the trial court abused its discretion in dividing the marital estate; and
- III. Whether the trial court erred in calculating the amount of his child support.

Facts and Procedural History²

Husband and Wife began cohabiting in 1994 and were married on March 17, 1999. They had one child, K.M., born on September 23, 1998. Husband was self-employed, earning \$3000 to \$17,462 a year cutting trees and selling crafts. Pet. Ex. 13. Wife worked as an office manager, earning \$18,951 to \$45,500 a year. *Id.*

In 1990, before the parties began cohabiting, Husband obtained title to a residence in Florida. During the parties’ cohabitation and marriage, the parties sporadically used the Florida property for vacations. In 1996, Husband began leasing the Florida property, and thereafter it was primarily a source of rental income. Wife handled all the leasing and

financial aspects of the Florida property.

In 1994, the parties agreed to build a home on a lot given to Wife as a gift from her father (the Chesterton property). The lot was valued at \$15,000, and Wife paid her father \$3500 for the lot. During the building of the home, Wife continued to work and was Husband's sole source of employment and income. Husband and his family built the house, contributing labor valued at \$50,000. Wife obtained a home construction loan, and Husband received several construction loan draws in the amount of \$16,715 for his labor in building the home. The home was completed in May 1995.

On February 14, 2004, Wife received a personal injury settlement of \$14,285. On February 17, 2004, Husband was arrested and charged with possession of an illegal silencer for a gun. Husband was denied bail, remained in jail, and pled guilty. At the time of his arrest, police found \$3000 in the parties' basement and gave it to Wife. On February 20, 2004, Wife filed a petition for marriage dissolution.

On September 29, 2006, following a hearing, the trial court issued its dissolution decree, which provided in relevant part:

FINDINGS OF FACT

....

29. At the time of [Husband's] arrest on federal criminal charges, he stored \$3000 in cash in the basement of the parties' home. Federal Agents (ATF) did not claim the money and [Wife] kept it for herself. She was to obtain legal counsel for [Husband] but never did so.

30. During the marriage, [Wife] obtained a personal injury settlement of \$14,285. The proceeds from the settlement have primarily been spent. There remains \$3000 in savings from the proceeds.

² In his appellant's appendix, Husband included the chronological case summary for cause number 64D01-0402-PO-1466, rather than this cause. We were able to locate it elsewhere in the record.

....

53. [Husband] has failed to provide complete and adequate information necessary to the formulation of a child support guideline worksheet and the Court has found it necessary to impute his income from his seasonal employment.

54. The Court sets the income of [Husband] to be \$900 per week and [Wife's] income to be \$1050 per week. The Court adopts the findings and conclusions set out in [Wife's] Proposed Child Support Guideline Worksheet and sets child support at a sum of \$117.37 per week beginning the first Friday following the entry of this Order.

CONCLUSIONS OF LAW

....

13. That the following property is found not to be part of the marital pot:

- a. \$3000 cash found in basement
- b. [Wife's] settlement from auto accident and any proceeds thereof[.]

....

17. The total marital pot has a value of \$225,863.94. This includes:

Florida Equity: \$68,162.23

Chesterton Equity: \$88,923.19

[Wife's] 401(k): \$170.75

[Wife's] Fidelity [IRA]: \$14,296.77

[Wife's pension]: \$4,226.00

Personal Property and [vehicle]: \$50,085.00

18. That from the equity on the Florida Property, the following secured liens shall be set off and established by this Order:

a. A lien/equitable mortgage/mortgage for \$15,000 in the name of [Wife's attorney].

b. A lien/equitable mortgage/mortgage for \$15,000 in the name of [Husband's attorney].

19. That the realty in Florida is to be placed on the market immediately, sold, and [Husband] shall owe and pay all costs associated thereto. From the proceeds from the sale, the liens of both attorneys shall then be paid.

20. The remaining amount shall inure to the benefit of [Husband].

21. That [Husband] shall receive those items of personal property listed in Supplement C with [his name] listed to the right.

22. That [Wife] shall obtain all right, title and interest in the Chesterton Property

23. That [Wife] shall retain, in her name, and be given all financial accounts, IRA's, 401(k)'s, pensions, and the 1995 GMC, as well as the personal property listed in Supplement C with [her name] listed to the right column.

24. That the Court deviates from the presumption of an equal distribution of property because of [Husband's] contribution, or lack thereof, to the income which produced, maintained and kept said properties. Additionally, the pensions and financial assets were earned by [Wife] through her employment. Finally, [Wife] bought the land which comprised the Chesterton Property and [Husband's] primary and sole source for his ownership interest in the Chesterton Property is the labor that he put into building the residence, of which he was paid from the home construction loan. The shares in mathematical form equate to a 60/40% split in marital assets for [Wife].

Appellant's App. at 15-22.

On October 27, 2006, both parties filed a motion to correct error. On November 3, 2006, the trial court granted Wife's motion and denied Husband's. The trial court's order provided, *inter alia*, that the equity in the Chesterton real estate should read \$68,362.23 and the equity in the Florida real estate should read \$88,912.19. *Id.* at 41. The order also adjusted the total value of the parties' personal property to \$44,865, with the result that Husband received personal property valued at \$40,460 and Wife received personal property valued at \$4405. With these adjustments, the parties' marital estate had a value of \$223,832.94. Husband appeals.

Discussion and Decision

Standard of Review

Where, as here, the trial court enters findings of fact and conclusions thereon, we use the following standard of review:

[W]e must first determine whether the evidence supports the findings and second, whether the findings support the judgment. The judgment will be reversed only when clearly erroneous, i.e., when the judgment is unsupported by the findings of fact and conclusions entered on the findings. Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. To determine whether the

findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility.

Breeden v. Breeden, 678 N.E.2d 423, 425 (Ind. Ct. App. 1997) (citations omitted).

I. Marital Assets

Husband challenges the trial court's decision to exclude the \$3000 found in the basement by police and Wife's personal injury settlement of \$14,285 from the marital estate.

The division of marital property in Indiana involves two steps. *Thompson v. Thompson*, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004), *trans. denied* (2005). First, the trial court must designate the property to be included in the marital estate. *Id.* In making this determination, the trial court must include property "owned by either spouse prior to the marriage, acquired by either spouse in his or her own right after the marriage and prior to final separation of the parties, or acquired by their joint efforts." Ind. Code § 31-15-7-4(a). The term "property" means "all the assets of either party or both parties[.]" Ind. Code § 31-9-2-98. With certain limited exceptions, this "one-pot" theory specifically prohibits the exclusion of any asset from the scope of the trial court's power to divide and award. *Coffey v. Coffey*, 649 N.E.2d 1074, 1076 (Ind. Ct. App. 1995). Only property acquired by an individual spouse after the final separation date is excluded from the marital estate. *Id.*

Here, we observe that the \$3000 found in the parties' basement by police and Wife's personal injury settlement are assets that Wife acquired prior to the parties' final separation. However, only property in existence at the time of the division of the marital estate, absent evidence of dissipation, is available to be divided and distributed. *See Quillen v. Quillen*, 659 N.E.2d 566, 574 (Ind. Ct. App. 1995) (observing that money used to satisfy debts prior

to dissolution is not marital property subject to division), *aff'd in relevant part by* 671 N.E.2d 98, 100 (Ind. 1996). At the time of the property division, Wife had spent all the money that the police found in the basement and all but \$3000 of the personal injury settlement on living expenses. Husband has not claimed that Wife dissipated marital assets. Thus, Wife had assets of \$3000 that the trial court failed to include in the marital estate. However, errors in the division of marital assets may be considered harmless. *See, e.g., Balicki v. Balicki*, 837 N.E.2d 532, 541 (Ind. Ct. App. 2005) (holding that inclusion of nonexistent asset was harmless error where husband would receive 46.2 % of marital assets if the asset were excluded rather than 44.5%), *trans. denied* (2006); *Elkins v. Elkins*, 763 N.E.2d 482, 486-87 (Ind. Ct. App. 2002) (holding erroneous inclusion of asset in marital estate was harmless where inclusion meant wife received 56.5% of marital estate rather than 57.5% of marital estate). The error here, as we demonstrate below, is harmless.

II. Division of Marital Property

Husband alleges that the trial court erred in dividing the marital estate. We review a trial court's division of a marital estate for an abuse of discretion. *J.M. v. N.M.*, 844 N.E.2d 590, 602 (Ind. Ct. App. 2006), *trans. denied*. An abuse of discretion occurs when a trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* In reviewing a trial court's division of a marital estate, we consider only the evidence most favorable to the trial court, and we may not reweigh the evidence or reassess the credibility of witnesses. *Id.* A trial court's discretion in dividing marital property is to be reviewed by considering the division as a whole, not item by item. *Fobar v. Vonderahe*, 771 N.E.2d 57, 59 (Ind. 2002). The party challenging the trial court's division of the marital

estate must overcome a strong presumption that it considered and complied with the applicable statute. *Frazier v. Frazier*, 737 N.E.2d 1220, 1223 (Ind. Ct. App. 2000). Indiana Code Section 31-15-7-5 requires the trial court to divide the marital estate under the presumption that an equal division between the parties is just and reasonable.

Because the trial court's treatment of the parties' attorney fees is relevant to determining how the trial court divided the marital estate, we must first briefly address Wife's assertion that the trial court erred in its treatment of attorney fees. Wife asserts that "[t]he court ordered that [Husband] pay, from his share of the marital estate, the sum of \$15,000.00 for [Wife's] attorney and the sum of \$15,000.00 for his own attorney." Appellee's Br. at 13. Wife mischaracterizes the trial court's order. The trial court did not order Husband to pay Wife's attorney fees. Rather, to insure that the attorneys of both parties would receive compensation, the court set aside a portion of the marital estate for this purpose by ordering that the parties' attorney fees were to be paid from the proceeds of the sale of the Florida real estate. We find no error here.

We now turn to Husband's argument. Specifically, he takes issue with the trial court's initial conclusion that an award of 60% of the marital estate to Wife and 40% to Husband is just and reasonable. This 60/40 split, however, occurs only when the initial, incorrect values are applied, that is, \$88,912.19 for the equity in the Chesterton real estate and \$68,362.23 for the equity in the Florida real estate. The trial court's order on the motions to correct error corrected these values but did not provide a recalculation of the division of the marital estate. When the correct values of the Chesterton and Florida properties are applied, \$68,362.23 and \$88,912.19 respectively, the parties receive roughly equal portions of the marital estate.

Further, this holds true even when the \$3000 remaining from Wife's personal injury settlement is included in the marital estate and awarded to Wife. After deducting \$30,000 for attorney fees, the total value remaining in the marital estate is \$193,832.94. It is divided as follows:

Husband

\$58,912.19 equity in Florida real estate less attorney fees
40,460.00 personal property award as per order on motions to correct error
\$99,372.19 = 51.3% of the marital estate

Wife

\$68,362.23 equity in Chesterton real estate
170.75 Wife's 401(k)
14,296.77 Wife's Fidelity IRA
4,226.00 Wife's pension
4,405.00 personal property award as per order on motions to correct error
3,000.00 amount remaining from Wife's personal injury settlement
\$94,460.75 = 48.7% of the marital estate

We understand that Husband must pay the costs associated with the sale of the Florida real estate, which will necessarily reduce his share, but Husband is receiving more than half the marital estate. An equal distribution is presumed just and reasonable pursuant to Indiana Code Section 31-15-7-5. Implicit in the trial court's decision not to revisit its initial distribution of marital property after learning that it had previously used incorrect values is the finding that an equal distribution here is just and reasonable. Given that the application of the correct property values results in a roughly even distribution of the marital estate, Husband's challenge to the 60/40 split is now moot. Additionally, the trial court's initial decision reflecting a 60/40 split is rendered meaningless, and accordingly, it is unnecessary to

redistribute the marital estate to achieve a 60/40 split.³ We therefore affirm the trial court's division of the marital estate.

III. Child Support

Husband contends that the trial court erred in determining his child support payment. Child support is calculated based on the income shares model provided by the Indiana Child Support Guidelines. *McGill v. McGill*, 801 N.E.2d 1249, 1251 (Ind. Ct. App. 2004). The Guidelines are founded on the premise that children should receive the same portion of parental income after a dissolution that they would have received if the family had remained intact. *Id.* Consistent with this principle, the cost of supporting children is apportioned between the parents according to their means. *Id.* We presume that a child support calculation determined pursuant to the Guidelines is valid. *Id.*

Specifically, Husband contends that there is no evidence in the record to support the trial court's determination that his weekly gross income is \$900, which equates to a yearly income of \$46,800. Our review of the record reveals that Husband confirmed that in the past he had yearly incomes of \$3000, \$7000, and \$13,000, although he admitted that those were lean years. Appellant's App. at 60-61. There is also evidence that he earned \$15,546 in 2001 and \$17,462 in 2002. Pet. Ex. 13. A yearly income of \$20,800 is supported by Wife's child support worksheet, which imputed a weekly gross income of \$400 to Husband, and this

³ We note that Wife concedes that "[a]s an equal division of marital assets, the effect of the court's order is consistent with I.C. 31-15-7-5, and may be upheld." Appellee's Br. at 6.

exhibit was admitted without objection from Husband. Appellant's App. at 45; Pet. Ex. 9. We observe that none of these yearly incomes approaches a weekly income of \$900.

Nevertheless, Wife argues that the evidence that Husband "made \$13,000 in a year cutting trees, and that said income was earned in four months during the summer, such that over the course of twelve months, \$39,000 could be imputed to him." Appellee's Br. at 20. We fail to see the logic in imputing a \$39,000 yearly income to Husband when the record establishes an *actual* yearly income of \$13,000.

We note that the trial court stated that it was necessary to impute income to Husband because Husband failed to produce adequate and complete evidence of his income. In fact, Husband did not submit a child support worksheet. Since 1989, the Indiana Child Support Guidelines have required, in all cases in which the court is requested to order support, that both parents complete and sign, under penalty of perjury, a child support worksheet to be filed with the court verifying the parents' incomes. *Glover v. Torrence*, 723 N.E.2d 924, 931 n.2 (Ind. Ct. App. 2000). In *Payton v. Payton*, another panel of this court found that it could not adequately review the trial court's child support order where the parties had not submitted verified child support worksheets and the trial court had not entered adequate findings to justify and explain its order. 847 N.E.2d 251, 253-54 (Ind. Ct. App. 2006). Therefore, the *Payton* court remanded for the trial court to enter more complete findings or to obtain and adopt a party's verified child support worksheet. *Id.* at 255.

Here, although the trial court purported to adopt Wife's child support worksheet, the evidence does not support a finding that Husband earns \$900 a week and Husband did not submit his own worksheet. Accordingly, we reverse and remand for the trial court to obtain

Husband's verified child support worksheet and recalculate Husband's child support. Because we are remanding on this issue, we also direct the trial court to include the \$3000 remaining from Wife's personal injury settlement in the marital estate and award it to Wife.

Affirmed in part, reversed in part, and remanded.

DARDEN, J., and MAY, J., concur.